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AUTHOR Bertrand, Andre
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ABSTRACT

Although the concepts of "droit d'auteur" (author's right) and copyright derive from different traditions, they are nearly synonymous in that both protect original works of the mind against reproduction or representation made without consent of the author or the author's successors in title. Implications of the electronic age for both of these concepts are discussed, touching briefly on current issues which consider "droit d'auteur" and copyright with regard to: (1) copyright and scientific works, (2) advertising and copyright, (3) copyright and electronic systems for musical composition, (4) electronic publishing, (5) artificial intelligence, (6) problems specific to audiovisual works, and (7) the duration of protection under copyright. Among the neighboring, or similar, rights that will have to be redefined in the electronic age are the rights of performers and the right to one's own image as portrayed in photographs. Because the broad principles of the Universal Copyright Convention are not interpreted in the same way by various national courts, an annotated guide to the Convention or the addition of some model provisions may be necessary to safeguard creators and performers of original works. An attachment contains a declaration composed by the participants in the conference with regard to copyright and associated rights. (SLD)

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# REFLECTION ON THE ROLE AND CHALLENGES OF COPYRIGHT ON THE EVE OF THE TWENTY-FIRST CENTURY

Paris, 16-18 November 1992

## 'DROIT D'AUTEUR', 'COPYRIGHT' AND NEIGHBOURING RIGHTS AT THE CROSSROADS

# 'DROIT D'AUTEUR', 'COPYRIGHT' AND NEIGHBOURING RIGHTS AT THE CROSSROADS

by

Maître André Bertrand[1]

## I. 'DROIT D'AUTEUR' AND 'COPYRIGHT'

### A. Historical background to 'droit d'auteur' and 'copyright'

1. Unlike many other rights, 'droit d'auteur' and copyright do not have their roots in Greek or Roman law. It was the invention of printing in the fifteenth century that, by making it possible to reproduce manuscripts mechanically and sell them, raised the question of the respective rights of printers and authors.

2. The earliest legislation aimed at protecting authors' rights - passed in England in 1710 - was 'Queen Anne's Statute' 'for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors of such copies ...' for a period of 21 years. The principles of 'Queen Anne's Statute' were taken up by the first United States Copyright Act, of 31 May 1790, whose purpose was 'To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries' (Constitution of the United States of America, Article 1, para. 8).

3. In France the rights of authors and printers were governed for nearly three centuries by the granting of royal privileges. It was not until the Revolution that actual legislation was adopted, in the form of the law of 13/19 January 1791 on entertainment and, more importantly, the law of 19/24 July 1793 on authors' ownership rights, which laid down the foundations of 'droit d'auteur' in seven articles. After the Napoleonic epic the law of 19/24 July 1793 came to be used as a reference for several decades by 'most countries of the civilized world' (L.F. Rebello, 'Letter from Portugal', *Copyright*, 1987, p. 151).

4. The law of 19/24 July 1793 did not differ greatly from Queen Anne's Statute or the Copyright Act of 1790, in that all these laws established for each publication a monopoly of exploitation by the author, but the two sets of legislation were the product of two distinct philosophies.

Queen Ann's Statute, like the American Copyright Act, was based on a sort of social contract between the author and society, the idea being that the monopoly of exploitation granted to the author would, like that enjoyed by the owner of a patent, stimulate creativity and thereby benefit the whole of society. Conversely, 'droit d'auteur' was regarded as a sort of fundamental prerogative arising from natural law. Chapelier, one of the committee chairmen for the 1791 law, had emphasized that the work of a writer was 'the most sacred, legitimate, inviolable and personal of all property'.

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1 The author, a doctor of law, is an appeals court barrister in Paris. This document was written at the request of the UNESCO Secretariat.

After 1814 the philosophical difference between the 'Anglo-Saxon' and French or civil-law approaches was to result in the emergence in French court decisions of the concept of 'moral' rights as a specific attribute transcending time and space, a concept that was designed to protect the writer's authorship and the integrity of his or her work.

It should be emphasized that the divide that opened up after 1814 between 'droit d'auteur' and 'copyright' is now starting to close. One reason is that the English-speaking countries are beginning to recognize the concept of moral rights, even if only to a limited extent. Chapter IV of the United Kingdom Copyright, Designs and Patents Act 1988 is entitled 'Moral Rights' (although it is concerned chiefly with authorship) and in the United States the Visual Artists Rights Act of 1990 added an article (106-A) on 'Rights of certain authors to attribution and integrity' to the Copyright Act of 1976. Another reason is that the countries that defend the moral rights of authors most strongly have in the past few years adopted legislative measures (such as France's Law of 3 July 1985, on successors in title) or legal principles to deal with abuses of moral rights.

5. Despite their 'philosophical' differences and the consequences of those differences it may now be said that the concepts of 'droit d'auteur' and 'copyright' are to a certain extent synonymous. Both theoretically arise solely from the conception of the work. However, national legislation sometimes requires a deposit or registration. This is so, for instance, in American law, to substantiate an author's claim to certain types of damages in case of infringement, and in French law, for audio-visual works, so that the owner of the copyright may use it to contest claims by third parties.

6. Finally, in the eyes of both 'droit d'auteur' and 'copyright' a work usually has to satisfy just one basic requirement to enjoy protection under the law: it must be 'original'. A work can be described as 'original' provided it conveys or expresses the personality of the author and is not merely a copy of an existing work.

7. 'Droit d'auteur' and 'copyright' protect original works of the mind, whatever the merits of the author and the purpose of the work, against any reproduction or representation made without the consent of the author or his or her successors in title. The owners of the copyright have a monopoly of exploitation, or 'economic rights' in the work. How long this protection lasts depends on the type of work (for some the protection covers the lifetime of the author plus a further period, for others it is calculated from the date of creation or publication) and on the legislation applicable (the range being from 25 to 70 years). In most countries the duration of the economic rights granted to authors has been considerably extended during the past few years. In France it was five years after the death of the author under the Law of 1791, went up to 10 years in 1793, 20 years in 1844 and 50 years in 1866 and became 70 years for musical works in 1985.

8. Originally 'droit d'auteur', like 'copyright' concerned only literary works. Their scope was gradually extended to other artistic areas in a series of stages (graphic art in England from 1734, musical compositions in the United States from 1831, photographs in the United States from 1865, etc.), and in recent years it has even embraced works produced by the world of industry, such as computer software.

9. 'Droit d'auteur' and 'copyright' now cover such varied creations as books, literary, artistic and scientific writings, lectures, plays, choreographic works, circus and pantomime acts, musical compositions with and without lyrics, cinema and television films, graphics and plastic art works, architecture, typographical works, photographs, applied art, illustrations, maps, plans and computer software.

10. Since the areas covered by 'droit d'auteur' and 'copyright' are not restrictive they can include any new forms of art, including those created with the help of electronic systems.

11. The protection granted by 'droit d'auteur' and 'copyright' differs from the protection granted by patents in that it covers not the theories or ideas on which works are based, only the form of expression and structure of those works. The creator of a work has the right only to prevent third parties from copying it illicitly; he or she cannot object to their producing a similar work by their own creative process. This is why copyright theoretically has no monopolistic or anti-economic effects.

## B. Some current problems to do with 'droit d'auteur' and 'copyright'

### Copyright and scientific works

12. Works protected by copyright include both 'scientific' works proper and literary works of a scientific nature. Listings containing the source programs used in software, various types of plan including architectural plans, doctoral theses, certain specific sets of calculations (such as those used in astrology, engineering, statistics, studies and surveys and polls of public opinion), meteorological analyses and satellite photographs are also protected by copyright.

13. Since the principle of copyright protects only the written expression of these scientific works the extent of the protection it gives them is vague and therefore open to debate. Whereas it is accepted that books explaining unpatented methods and procedures are protected against 'literary reproduction', putting those methods into practice does not in principle constitute an infringement of copyright.

There are, however, some laws and precedents providing for exceptions to this. Under French law, for works of architecture, 'reproduction shall also consist in the repeated execution of a plan or standard draft' (Law of 11 March 1957, Article 28), and in the United States a court has ruled that it could be illegal for a computer program to copy the 'method' described in a manual (*Williams* v. *Arndt,* 626F. Supp.571). But as these principles have never been laid down systematically, practice varies from one country to another and even from one court to another. So whereas German judicial precedent protects mathematical tables and the notes accompanying scientific articles, the Paris appeals court has ruled that a novelist may reproduce material written by an ethnologist 'to make his characters appear lifelike' (the *Vautrin* case).

14. Given that science occupies an increasingly dominant place in human creativity, it may be necessary to consider whether scientific creation can nowadays be expressed in other than a written or artistic form and whether it might not be appropriate to define the concept of a scientific work susceptible of copyright protection, in order to prevent drawn-out legal arguments and the pirating of this type of work for financial ends. Bearing in mind that the results of scientific research should be available to everyone, the time may have come to define the concept of scientific work more precisely by means of model provisions or recommendations that could be used as a reference by signatories of the Universal Copyright Convention, especially regarding the extent of the protection copyright might give such works.

### Advertising and copyright

15. As long as they are original, all creative works enjoy copyright protection - and this includes advertising slogans, posters, videos, jingles and so on. Because of modern methods of communication, such as cinema, radio and television, advertising has become an industry in its own right. Nowadays advertising budgets total more than 1,000 French francs per person per year in many countries, and for the United States the figure is more than US $500. The press, radio, television, posters and gadgets are among the media used to extol the virtues of an enormous range of goods and services. Because of the large investment it involves, advertising - along with computer software - is nowadays one of the areas most concerned by copyright.

16. As a result of pressure from advertising agencies a few countries, including France, have waived the basic principles of copyright in order to give exploitation rights to advertising agencies, which are regarded in a way as true 'producers of works of advertising' (Law of 3 July 1985, Article 14). Is this special treatment justified in the light of the principles of copyright? Does it encourage creativity in advertising and, if so, would it not be appropriate to give works of advertising a special international status by means of model provisions or recommendations?

17. Under the legislation of most countries, the United States and the United Kingdom for example, the advertiser can acquire the rights in advertisements he or she has financed against payment of a lump sum. Other legislations, such as that of France, are much more ambiguous. Although they do not totally exclude the idea of lump sum payments, they also allow for the principle of payment proportional to the extent the advertisement is exploited, as decided in accordance with an administrative scale that is quite difficult to apply. These legislative differences, the borders of which are not always very clear, have given rise to a number of disputes that often cannot be resolved by contracts, because some countries fix contractual rules or prerogatives for authors that come under the heading of public policy (*ordre public*), meaning that they cannot be waived. It would seem that there are obstacles here to the transnational exploitation of advertisements, although such use is inescapable in view of the increasing tendency to distribute magazines and broadcast television programmes worldwide. Would it not be appropriate to harmonize the regulations covering advertisements in a transnational context by means of model provisions or recommendations?

18. The use of satellites to broadcast audio-visual works raises a number of copyright problems that probably also arise with regard to advertising. In other words, surely any model provision or recommendation covering the exploitation of works by satellite should also include advertising broadcast by the same means?

### Copyright and electronic systems for musical composition

19. Music, usually defined as 'the art of combining sounds', is based on rules that vary according to the time and place. Western music, for example, is traditionally characterized by the three elements of melody, harmony and rhythm, and copying these, singly or in combination, may be judged by a court to be an infringement of copyright. In practice, however, one finds (to put it at its simplest) that in music copyright usually protects melodies or successions of notes.

20. The progress made in electronics and then computerization have allowed many electroacoustic instruments to be developed and played to an increasingly wider audience. After the 'modern' synthesizer invented in 1965 by Robert Moog and used in 1968 by Walter

Carlos as the sole instrument on the LP 'Switched-On Bach', an electronic version of works by Johann Sebastian Bach, came the guitar-synthesizer (1978), the rhythm box (1965), the numerical synthesizer (1981), which is now completely programmable and capable of reproducing the most complex rhythms, electronic percussion (1980) and the sampler (1980).

Until about 1980 composers and musicians used these electronic instruments and systems to produce notes, chords, melodies and rhythms. Electronic instruments and systems played the same role as traditional instruments and therefore raised no particular copyright problems. The use of an instrument, however sophisticated, cannot deprive the creative manipulator of that instrument of his or her status as author of the musical composition thus produced. The manufacturer of the machine or the person who programmed it cannot claim copyright in such music. These principles have been asserted by the Committee of Government Experts set up jointly by UNESCO and the World Intellectual Property Organization (WIPO) in 1988 (UNESCO-WIPO/CGE/SYN/3.II, p.26, principle MW2).

21. With the invention of the sampler and various systems based on the same technology, the instrument is used to reproduce recorded sounds or melodies for the musician to arrange at will. This situation is therefore one in which elements of existing works are memorized and reassembled in much the same way as the elements in a data bank. The sampling of extracts of music is therefore undeniably tantamount to illicit copying as soon as it uses elements that are protected by copyright and are still recognizable in their new form. In the Netherlands, a court decided in the *Ride On Time/Love Sensation* case that sampling was unfair competition (District Court of Haarlem, 13 October 1989, BIE 1991, No.1, p.20). Judge Kevin Duffy of the New York South District Court, in a ruling handed down on 16 December 1991, found singer/song writer Biz Markie guilty of sampling ten notes and three words from the song 'Alone Again' by singer/songwriter Gilbert O'Sullivan (USDC South, N.Y., 16 December 1991, Lexis 18405).

Because of the large number of variations possible, musical compositions are the most difficult type of work to defend in court. Trials are long and costly, and the idea of what constitutes copying varies considerably from one court to another. Because of the interests at stake and the technological developments that have taken place in the field of music, would it not be appropriate, by means of model provisions or recommendations, to draw a clear distinction between what is and is not allowed, especially regarding the use of sounds or musical extracts as part of a musical composition or reproduction, in order to harmonize the rulings and attitudes of the courts and provide musicians with a clear set of rules?

22. The use of new generations of samplers and similar electronic systems is also radically altering the way music is composed. Composition is increasingly focusing on sounds. Composers use these to create 'musical palettes', much like an artist's palette, which they then store in computerized systems capable of reproducing them, with variations, and use them to create melodies. Nowadays samplers can make available to us whole orchestras, capable of reproducing the most unusual sounds and the particular timbre or tone quality of a given performer. Drummers are no longer needed: the machine can reproduce the individual sound of any well-known drummer and alter it at will. Should we not think about protecting these characteristic sounds, either because they are the result of research or genuine creativity or because they bear the stamp of the personality of the performer who first made them?

23. In order not to obstruct the development of new musical systems while protecting authors' fees or even the personality rights of some performers, should we not, by means of model provisions or recommendations, establish rules to be respected by manufacturers and in some cases programmers in the use of musical sounds or samples belonging to third

parties? Perhaps we should also introduce the payment of some kind of remuneration by those using samplers, to take account of the fact that they encourage illicit playback. If so we should also decide how this remuneration should be calculated and distributed.

**Electronic publishing**

24. Literary and scientific works are increasingly being published by electronic means, that is by using data bases, CD-ROMs and so on, whereas most publishing contracts still relate only to paper editions. Since publishing contracts in most countries are traditionally intended to be construed restrictively, perhaps we should, by means of model provisions and recommendations, equate electronic with paper publishing in order to prevent many lawsuits in the months and years to come - or save publishers from having to negotiate new contracts.

25. The CD-ROM, which is the principal electronic publishing medium in use, makes it possible to combine not just text and pictures but also extracts from films, sounds and musical compositions. For instance, someone consulting the section on Mozart in an encyclopedia on CD-ROM could not only read about his life and look at a picture of him, as is already possible with traditional encyclopedias, but also listen to passages from his musical works and watch extracts from his operas.

In the use of this new technology both 'droit d'auteur' and 'copyright' present a major restriction for publishers, who should in theory obtain permission for every type of work used on such multimedia systems; whereas a small printed encyclopedia requires between 1,000 and 2,000 authorizations, the CD-ROM version would require between 4,000 and 6,000, not to mention those necessitated by legislation peripheral to copyright, such as neighbouring rights (for passages of music) or 'the right to one's image' ('le droit à l'image') (for photographs and other pictures of performers). The growth in multimedia technology and the CD-ROM in particular must therefore be accompanied by clarification of the restrictions imposed by 'droit d'auteur' or 'copyright'.

26. One way of making it easier to develop CD-ROMs might be to allow more exceptions to the protection afforded by copyright under national legislation, especially concerning 'short quotations' or 'fair use'. However, although the concept of 'fair use' is flexible enough to allow the use of certain types of work in producing CD-ROMs, the concept of 'short quotations' is interpreted in a much more restrictive way: it does not seem to include drawings or photographs. In many settings the concept of 'short quotation' is still open to debate: for instance, can a still taken from a film be regarded as a short graphic quotation from the film? At the moment a publisher wishing to produce a CD-ROM on the cinema and include stills and musical extracts from films cannot be sure that such material will come under the heading of 'short quotations' or 'fair use'.

Given the unavoidable expansion of multimedia technology, perhaps we should, in order not to hinder the development of these new technological modes of expression and communication, draw up model provisions and recommendations to:

establish clear rules regarding 'short quotations' and 'fair use' in the production of multimedia works;

harmonize exceptions to the protection afforded by 'droit d'auteur' ('short quotation') and 'copyright' ('fair use'), especially concerning graphic images and photographs.

**Artificial intelligence**

27. The roots of artificial intelligence lie in the prehistory of computer science: its pioneers, such as Alan Turing, wondered whether machines might one day be able to think like human beings. In 1966 Joseph Weizenbaum developed one of the earliest systems, originally called ELIZA after the heroine of 'Pygmalion', which parodied a psychoanalyst questioning a patient. A later version called DOCTOR came to be regarded by many medical practitioners as a possible working tool, whereas its inventor had seen the method simply as a way of highlighting the problems computers programmed to use human language might cause. It is said that when he learned that his creation had been really quite favourably received by the medical profession Weizenbaum began to question his entire research and came to the conclusion that, even if it were possible to programme machines to think like human beings, it might be in our own interests not to succumb to the temptation. Several such systems were created in the 1970s, including the better-known 'EMYCIN' developed by the Faculty of Medicine of Stanford University to diagnose meningitis and bacterial infections and prescribe appropriate treatment. The principles that emerged during the development of these expert systems are still in use, even though programming has made great progress.

28. We use the term 'artificial intelligence' ('AI') to refer generally to all the electronic and computer systems that work by trying to copy or imitate the processes of thinking and intelligence, or simply human movements and gestures. AI is usually divided into two branches:

the first, AI proper, covers speech-recognition systems, shape-recognition systems, expert systems and instruction systems;

the second, robotics, uses recognition systems in combination with mechanics.

It is mainly expert systems that raise complex problems of ownership and protection of intellectual property.

29. Traditional expert systems are made up of two basic elements, an inference engine and a knowledge base. The inference engine is a traditional computer program, while the knowledge base is made up of information set out in accordance with the analytic approach followed by a specialist or an 'expert' in the field under review. All the expert's knowledge is summarized by a series of 'if ... then ...' statements forming a tree whose furthest branches lead to replies contained in the basic data. The knowledge base is simply an ordinary data base arranged in such a way that the inference engine can find in it, in an intelligent and rational way, the answers to the questions asked by the user. More recent expert systems often use 'neurone networks' enabling them to reconstitute, using a great many examples of solutions supplied by an expert, a line of reasoning that does not lend itself to modelling. The knowledge base of such a system increases as it is used.

Normally, the data base of a medical expert system will include (i) the know-how of a doctor carrying out a consultation, and (ii) a medical dictionary, making it possible to diagnose and then prescribe appropriate medication. In order to develop an expert system aimed at diagnosing car breakdowns and suggesting the necessary repairs, a programmer will use as a data base the knowledge of a skilled mechanic, gradually integrating it into the product, and as a knowledge base the sort of repair manual on sale to the public. The knowledge base is usually drawn up using an expert's know-how. Some companies collect such know-how from their engineers before they retire in order to build up expert systems that will preserve their knowledge and technical know-how indefinitely.

30. Should the mere passing on of know-how be regarded as a 'creation' protected by 'droit d'auteur' or 'copyright'? Can we talk about 'creation' in the 'droit d'auteur' or 'copyright' sense when someone is only expressing logical rules in a given context?

31. Can (or should) the expert passing on his or her know-how be considered the author of a data base, when very often the organizing of that know-how is a major piece of intellectual work? At Texas Instruments, an engineer who thought he would be able to explain the mechanics of his working methods in an hour actually had to work for seven months with several programmers in order to summarize his experience in 151 'if ... then ...'. (M. Maremont, 'Turning an expert's skill into computer software', *Business Week*, 7 October 1985.)

32. Should we not, by means of model provisions or recommendations, clearly define what we mean by a 'knowledge base', in order to protect the rights of those who have contributed their know-how to it?

**Problems that are specific to audio-visual works**

33. As we have already emphasized, copyright has been extended over the years to cover works created using new technologies. At the start of the twentieth century the courts had to rule on whether it could be extended to what was then called 'the cinematograph'. In France, it was not until 10 February 1905 that the Seine Civil Court, in a peremptory ruling, acknowledged that 'cinematographic prints are works of art protected by the Law of 1793 in that they are equivalent to photographs' (*Doyen* v. *Parnaland*, D.P. 1905, II, 389), and that the rights belonged to the producer/director rather than the camera operator. After 1910, when the cinema became a veritable industry, the various occupations were organized into a structure. But a single question soon came to dominate discussions on the subject: 'should the producer of a cinematographic work have the status of author?' (H. Dubois, *Le droit d'auteur*, 1950, p. 215).

34. In France, doctrine, and then actual rulings, put cinematographic works in the category of a work of collaboration from which the producer was excluded. In a decision handed down on 10 November 1947 (Gazette du Palais 1948, 1, 55, S. 1948, 1, 157, D. 1947, 529) in the *Mascarade* case, the Court of cassation confirmed this opinion, which has since been incorporated into French law as Article 14 of the Law of 11 March 1957, as revised on 3 July 1985. This article states:

> Authorship of an audio-visual work shall be deemed to belong to the physical person or persons who brought about the intellectual creation thereof.

In the absence of proof to the contrary, the co-authors of an audio-visual work made in collaboration are presumed to be:

1. the author of the script;
2. the author of the adaptation;
3. the author of the dialogue;
4. the author of the musical compositions, with or without words, especially composed for the work;
5. the director (*réalisateur*).

When an audio-visual work is adapted from a pre-existing work or script which is still protected, the authors of the original work shall be assimilated to the authors of the new work.

However, in order to protect the rights of the producer, French legislation also provides that 'contracts binding the producer and the authors of an audio-visual work, ... shall imply, unless otherwise stipulated ... assignment to the producer of the exclusive exploitation rights in the audio-visual work' (Article 63-1, Law of 11 March 1957, as revised by the Law of 3 July 1985). Initially the co-authors of the work, that is mainly the director and the author of the script, have the moral and economic rights to the work, following which the economic rights are automatically transferred to the producer. Consequently, the co-authors have the moral rights to the audio-visual work: they may therefore oppose any attack on its integrity, such as the making of cuts (including advertising breaks) or the addition of colour.

35. In the United Kingdom, the author of an audio-visual work is 'the person who takes the necessary steps to make the film' (Article 9(2)(a) of the Copyright, Designs and Patents Act 1988), that is the producer. In the United States, Article 101 of the Copyright Act regards the audio-visual work as a commissioned work belonging to the person who commissions it, in other words the producer again. Consequently, under both systems the producer initially has the copyright in the audio-visual work and therefore has far-reaching rights over the film, especially the right to make cuts or colour the film for the purpose of marketing it.

36. These two systems often come into conflict in a transnational context. For example, the heirs of John Huston applied to the French courts to have the colouring of the film 'Asphalt Jungle' condemned, even though it had been done lawfully in the United States by the Ted Turner company, which owned the film rights.

37. If we look closely at the two systems it becomes clear that:

(i) Their boundaries are not immutable. As already pointed out, before the 'Mascarade' decision of 1947 French courts had on several occasions decided that the producer could be regarded as the author of a film.

(ii) The intention of the French lawmakers - to protect the moral rights of authors of audio-visual works - could perfectly well be pursued as part of a more 'American' approach, because the concept of joint authorship is no obstacle to the assignment to co-authors of a minimum of moral rights.

(iii) The United States, a major producer of films, has established a system aimed at preserving a number of films.

In this context, should we not devise a balance between the interests of producers and those of the co-authors of audio-visual works that would make it possible to standardize the status of these works, as regards both 'droit d'auteur' and 'copyright'?

38. We used to talk about 'cinematographic' works, whereas nowadays we increasingly talk about 'audio-visual' works, that is 'animated sequences of images'. Video games and cartoons created by computers, for example, are audio-visual works. But where does an audio-visual work start and end, given that animated sequences of images can be created without filming anything?

Ought we to define the concept of an audio-visual work more precisely by means of model provisions and recommendations?

### The duration of protection under copyright

39. Any author of a work has economic or exploitation rights in his or her work. As I explained at the start, these rights were originally limited to a few years (five years *post mortem auctoris* in France under the Law of 1791). The duration of economic rights has been gradually extended in most countries. Nowadays, in the majority of countries, works created by one or more authors are protected for between 50 and 70 years after the death of the author or, for joint works, the last of the co-authors.

40. When the concept of copyright was first expressed many jurists wondered whether authors should not be granted a perpetual right of exploitation in their works. In the Netherlands, from 1796 to 1811 and again from 1814 to 1817, copyright legislation gave authors protection for an unlimited period. In France, the idea of perpetual copyright was rejected by Napoleon, who saw a number of drawbacks to the idea, especially in view of the increasing number of successors in title who would inherit the copyright. When the duration of economic rights was extended from 50 to 70 years *post mortem auctoris* people who wanted to exploit certain works had to find and come to an agreement with third-generation or fourth-generation heirs.

In other words *post mortem* protection, which continues for up to 70 years after the death of the author, is a source of practical problems, because in many cases the identities of all the co-authors and their successors in title are not known (this is true of many audio-visual works), nor is the exact date of the author's death.

This means that unlike a system under which protection is linked to the date of publication of the work, where one needed only to consult the copyright notice given in the work to know whether the economic rights of the author or successors in title had expired, the *post mortem* system makes it necessary to carry out what are sometimes very difficult searches to find out who the successors in title are.

Given that this situation is detrimental to many users in that they cannot gain access to works, because they do not know who owns the copyright, should we not extend to all works the international register set up for audio-visual works?

## II. NEIGHBOURING RIGHTS

### A. Performers

41. Before the French Revolution actors were forced to live on the fringes of society. They were even excluded from the Church, which censured them for their dissolute morals and went so far as to refuse them the last rites and a Christian burial. Their careers and means of subsistence were totally dependent on the goodwill of the kings and princes whom it was their job to amuse. After the Revolution and the abolition of privileges performers were freed from that restriction. Their success, and thus their careers, depended only on the public. If they met with public approval performers acquired a value of their own, attracting as many spectators as the show they were appearing in. Talma, Rachel and Sarah Bernhardt, for example, drew crowds throughout the nineteenth century. The phonograph, and later the cinema, made it possible to record first the voices and then the movements of performers, and eventually both at once. Captured on wax and film, performances lost their fleeting quality. The privileged moment once reserved for spectators in theatres or concert halls could be put into a box and played an infinite number of times. In addition, performances preserved on record, tape or film,

or even recorded live, can be broadcast by radio or television to millions of listeners or viewers throughout the world.

The invention of the gramophone, which made it possible to record singers' performances, raised for the first time the issue of how to protect them. In one of the first court cases over a gramophone record, the Seine Civil Court ruled on 6 March 1903 that 'sound reproduction, whether of melodies or of lyrics, belongs solely to the performer whose very personality it reflects; it is distinct from publication of the work and is not the property of the author' (*Enoch* v. *Compagnie des Gramophones*, *Gazette du Palais* 1903, 1, 468, S. 1907, II, 114). It was at this time that the great French jurist Pouillet pointed out that 'there is a final stage in the creative process: performance' (*Traité théorique et pratique de la propriété littéraire et artistique*, 2nd edition, Paris 1894, Section No. 18, p. 39).

42. Apart from a few legal controversies (for instance, in France the *Furtwängler* case, CA Paris, 13 February 1957, JCP 1957, II, 9838 concl. R. Lindon), most of the agreements made with professional bodies or collective administration societies satisfied performers' requirements until around 1960.

43. As a result of discussions by various bodies, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations was adopted on 26 October 1961 in Rome. It gave formal recognition to the concept of 'neighbouring rights', that is the rights of people whose work brings them into the authors' orbit.

According to Article 3(a) of the Rome Convention:

'"Performers" means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works.'

44. Can we be satisfied with this definition, which describes only performers in the traditional sense of the term, when many other categories of people, such as sportsmen and women, radio and television presenters and well-known personalities, also take part in shows and make use of their image? Should we, by means of model provisions and recommendations, redefine the concept of a performer and extend it to these new categories?

## B. 'The right to one's image' ('le droit à l'image')

45. 'The right to one's image' is in many countries, including France, an absolute right with hardly any exceptions. This means that a person can always forbid the dissemination of his or her picture, even if he or she had previously agreed to be photographed. Nowadays, however, pictures of people and especially performers are used in a wide variety of ways. Some countries, such as the United States, have already taken this to its logical conclusion and treat 'the right to one's image' (like the right to privacy in general) as a descendible economic right ('a right to publicity') managed by collective administration societies.

46. The lack of any real international status for 'the right to one's image' is a source of problems for news agencies who want to use the photographs in their possession. Publishing pictures of famous people, which is legal under English law, is an infringement of 'the right to one's image' as soon as the pictures enter French territory. Exceptions to the protection afforded by this right vary from country to country and do not even exist under many legislations.

47. In order not to disrupt the transnational distribution of magazines, television programmes and so on, perhaps we should, by means of model provisions and recommendations:

establish a transnational framework for 'the right to one's image';

lay down clear exceptions to it, for instance in news coverage;

establish principles allowing the emergence of administering societies capable of managing this right and making the work of news agencies easier.

## III. PROBLEMS COMMON TO AUTHORS AND PERFORMERS

### A. Performers, authors and the protection of consumers

48. Performers are increasingly becoming determining factors in the commercial success of records and films. In our media-oriented society performers are being 'manufactured' more and more artificially. In 1991, for instance, the American public discovered that the Milly Vanily group did not perform the songs on its records and television appearances but was a sort of 'façade' designed to promote songs recorded by others.

49. Should better protection be provided for 'consumers' in this field? Should we, for instance, by means of model provisions and recommendations, make it compulsory for television channels to tell viewers when performers are not singing live?

50. Exactly the same problem arises concerning the authors of literary works. Because well-known authors can be sure of selling thousands of copies of books bearing their names, more and more of them are 'lending' their names to unknown writers, who are thereby - under a name that is not their own - guaranteed success for their work.

51. Should we not forbid this type of publishing practice because it is aimed at deceiving readers?

### B. Harmonization of sanctions

52. The laws protecting authors and performers are of value only if they can be easily applied and if pirates and imitators are effectively punished by either the criminal or the civil courts. Should we not, therefore, by means of model provisions and recommendations, establish minimum sanctions, applicable worldwide, against pirates and imitators?

53. In many countries the wheels of justice turn slowly, and it is often ineffective because magistrates lack the necessary practical skill. Perhaps we should, by means of model provisions and recommendations, encourage the establishment in such countries of special copyright and neighbouring rights courts that could call on experts, and so ensure that the international conventions are respected.

## IV. THE UNIVERSAL COPYRIGHT CONVENTION

54. The Universal Copyright Convention contains broad principles, which national courts do not interpret and apply in the same way. In order to ensure that the Convention is applied in the same way everywhere, thus providing a safeguard for authors, perhaps we should either draw up an annotated guide to the Convention (which would not be an interpretation of its provisions) or complement the articles of the Convention by model provisions or detailed recommendations on points that might be open to interpretation.

## V. THE INTERNATIONAL CONVENTION FOR THE PROTECTION OF PERFORMERS, PRODUCERS OF PHONOGRAMS AND BROADCASTING ORGANIZATIONS (ROME CONVENTION)

55. Many jurists and professional bodies acknowledge that the Rome Convention on neighbouring rights contains numerous lacunae as a result of developments in technology. For example, the Convention does not cover several types of use, such as satellite and cable broadcasting, certain media, such as videograms, and certain practices, such as the renting of phonograms and videograms. However, opinions vary as to whether it would be appropriate to revise the Convention, especially as negotiations are already taking place in connection with GATT and in draft directives of the European Community.

Should the Rome Convention be amended? And, if so, which aspects of it could be modified without upsetting the careful balance of professional interests on which it is based?

**UNITED NATIONS EDUCATIONAL,
SCIENTIFIC AND CULTURAL ORGANIZATION
(UNESCO)**

**REFLECTION ON THE ROLE AND CHALLENGES OF
COPYRIGHT ON THE EVE OF THE TWENTY-FIRST CENTURY**

**Paris, 16-18 November 1992**

## DECLARATION

The participants of the Reflection Meeting on the Role and Challenges of Copyright on the Eve of the Twenty-first Century which took place in Paris from 16 to 18 November 1992, on the occasion of the 40th anniversary of the Universal Copyright Convention,

Having undertaken an interdisciplinary analysis of the new challenges created by the development of new technologies to the protection of copyright and neighbouring rights,

Considering the cultural and economic impact of copyright and neighbouring rights in a post-industrial society,

Taking into account the essential role of creativity in the cultural, scientific, technological and economic development of peoples,

Note that the application of new technologies provides new opportunities for the creation, production and distribution of works of the mind and, at the same time, tends to blur the frontiers established by the traditional concepts of the protection of copyright and neighbouring rights,

Congratulate UNESCO on having taken the initiative of calling this Interdisciplinary Reflection Forum with a view to formulating suggestions on the immediate prospects of copyright and neighbouring rights facing the challenges of the year 2000,

Draw the attention of UNESCO to the fact that this is the moment to thoroughly study the question of scientific creation, the present complexity of which makes it necessary to identify a legal framework of protection best suited to these intellectual creations and which at the same time would assure the free circulation of ideas and the universal access to the results of scientific research,

Bearing in mind the increasing demand for the exploitation of audiovisual works, invite UNESCO to examine the problems of copyright and neighbouring rights which result from this utilisation by new technological means of reproduction and dissemination in such a way as to facilitate society's access to these works while protecting the interests of the owners of copyright and neighbouring rights,

Invite UNESCO to closely follow the evolution of electronic publishing, of multimedia publishing and sampling, and recommend the parties concerned to bear in mind the need for the safeguarding of the legitimate interests of the owners of copyright and neighbouring rights, when such works are made available to the public,

Underline the fact that within this new context, collective administration appears to be the most appropriate solution to the problems of protection created by new technologies and that the latter permit, in their turn, the conception of new modes of collective administration of copyright and neighbouring rights,

Draw attention to the need to promote such innovative legal solutions to provide for the protection of the legitimate interests involved which would not endanger the traditional fundamentals of intellectual property,

Invite UNESCO to do everything necessary in order that the development of new technologies does not prejudice the moral and economic interests of authors, performers, producers of phonograms and broadcasting organizations,

Request UNESCO to reinforce its action to encourage the international protection of the owners of copyright and neighbouring rights through the Universal Copyright Convention and the other international conventions and declare that the effective protection of beneficiaries of moral and economic rights demands the firm application of national legislation and respect for international commitments undertaken by the States,

Recommend UNESCO to continue its teaching, training and information activities in the field of copyright and neighbouring rights, taking into account the fact that without due knowledge and the experience of qualified professionals, it is difficult, even impossible, to guarantee the efficient enforcement of the existing laws,

Also recommend UNESCO to promote the introduction of the basic notions of copyright and neighbouring rights into the educational programmes for authors and performers,

Further suggest that UNESCO develop a proposal to establish a "College of Experts" composed of international specialists on copyright and neighbouring rights, agreed upon by UNESCO, before which Member States could appeal in case of legal disputes which demand a high level of expertise.